

**BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

In the Matter of:

**NARDEV S. RANA DBA GROUND
CARRIER,**

Respondent.

**Docket No. FMCSA-2009-0137¹
(Western Service Center)**

ORDER DENYING PETITION FOR RECONSIDERATION

1. Background

On February 23, 2009, the California Division Administrator of the Federal Motor Carrier Safety Administration (FMCSA) served a Notice of Claim (NOC) on Nardev S. Rana dba Ground Carrier (Respondent).² The NOC, based on a February 11, 2009 compliance review, charged Respondent with three violations of the Federal Motor Carrier Safety Regulations: (1) two violations of 49 CFR 382.301(a), using a driver before the motor carrier has received a negative pre-employment controlled substances test result, with a proposed civil penalty of \$630 per count and; (2) one violation of 49 CFR 395.8(i), failing to require a driver to forward the original record of duty status within 13 days, with a proposed civil penalty of \$730. The NOC proposed a total civil penalty of \$1,990 for the three violations.

¹ The prior case number was CA-2009-0328-US1099.

² See Exhibit 1 to Field Administrator's Answer and Opposition to Petition for Reconsideration Pursuant to 49 CFR 386.64 and Memorandum of Law in Support (Claimant's Answer to Petition).

After Respondent failed to respond to the NOC, the Field Administrator for the FMCSA's Western Service Center (Claimant) served a Notice of Default and Final Agency Order (NDFAO) on April 1, 2009.³ The NDFAO advised Respondent that the NOC would become the Final Agency Order in this proceeding effective April 6, 2009, with the civil penalty immediately due and payable on that date.

On April 6, 2009, Respondent faxed to Claimant what appears to be his response to the NOC.⁴ Respondent admitted the § 395.8(i) violation. With respect to the § 382.301(a) violations, Respondent submitted several documents concerning Harinder Singh, one of the drivers cited for this violation in the NOC: an employment application dated March 31, 2009; a Request for Check of Driving Record dated February 12, 2009; an undated record of Mr. Singh's road test; and a copy of a Federal Drug Testing Custody and Control Form indicating that Mr. Singh was tested for controlled substances in April 2009.⁵ Respondent requested a reduction in the proposed penalty based on his alleged inability to pay the full penalty.

In his Answer to the Petition served May 6, 2009, Claimant requested that the petition be denied because Respondent defaulted by failing to timely reply to the NOC and did not set forth any basis for reconsideration of the Final Agency Order.

³ See Exhibit 3 to Claimant's Answer to Petition.

⁴ See Exhibit 5 to Claimant's Answer to Petition. Claimant treated this response as a Petition for Reconsideration of the NDFAO, although the response does not reference the NDFAO.

⁵ The drug testing form does not disclose the results of the test, nor does it indicate the type of test.

2. Decision

Because Respondent did not reply to the NOC within 30 days of service of the NOC, as required by 49 CFR 386.14(a), he defaulted.⁶ Under 49 CFR 386.64(b), a Notice of Default and Final Agency Order issued by a Field Administrator based on failure to timely reply to the NOC may be vacated if Respondent can demonstrate, in a timely filed Petition for Reconsideration, excusable neglect, a meritorious defense, or due diligence in seeking relief.

Respondent failed to meet his burden of demonstrating that the Final Agency Order should be vacated. Claimant established that Federal Express delivered the NOC to Respondent on February 25, 2009.⁷ However, Respondent did not offer any explanation for failing to meet the filing deadline. Therefore, he did not demonstrate that his failure to timely reply to the NOC was due to excusable neglect. Moreover, the documents submitted by Respondent concerning Mr. Singh do not provide a defense to the charge that Mr. Singh drove a commercial motor vehicle for Respondent on or about January 1, 2009 before the carrier received a negative pre-employment controlled substances test result. Three of the documents have no apparent relevance to the violation. Moreover, although Respondent provided evidence of a post-violation drug test in an apparent attempt to mitigate the civil penalty, this evidence does not establish a meritorious defense because it occurred after the violation and the NOC. As Claimant points out, the term “meritorious defense” in § 386.64 does not apply to requests to

⁶ The NOC reply deadline was March 30, 2009. This date was calculated by adding 30 days to the February 23, 2009 service date of the NOC and an additional five days because the NOC was served by mail. *See* 49 CFR 386.8(c)(3).

⁷ *See* Exhibit 2 to Claimant’s Answer to Petition.

reduce a civil penalty where the Respondent does not contest the substantive violations set forth in the NOC.⁸

Section 386.64(b) authorizes—but does not require—the Assistant Administrator to vacate the Final Agency Order if Respondent acts with due diligence in seeking relief. Even if, for the sake of argument, Respondent acted with due diligence in belatedly filing a response to the NOC, it would be an empty exercise or futile gesture to vacate the Final Agency Order because he did not demonstrate a meritorious defense.⁹

The Petition for Reconsideration is denied. The Notice of Claim is the Final Agency Order in this proceeding. The civil penalty of \$1,990 is due and payable immediately. Payment may be made electronically through FMCSA's registration site at <http://safer.fmcsa.dot.gov> by selecting "Online Fine Payment" under the "FMCSA Services" category. In the alternative, payment by cashier's check, certified check, or money order may be remitted to the Claimant at the address shown in the Certificate of Service.

It Is So Ordered.



Rose A. McMurray
Assistant Administrator
Federal Motor Carrier Safety Administration

9.3.10
Date

⁸ See *In the Matter of Curtis R. Lunney dba L & F Transport*, Docket No. FMCSA-2007-28487, Order Denying Petition for Reconsideration, May 5, 2009, at 3.

⁹ See *In the Matter of Wells & Wells Equipment, Inc.*, Docket No. FMCSA-2006-25836, Order on Reconsideration, October 8, 2008, at 5.

CERTIFICATE OF SERVICE

This is to certify that on this 7 day of September, 2010, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to the persons listed below.

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